Supreme Court, U.S.
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No.98-1140

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOHN WINTERS, SR., INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF MARGARET WINTERS, DECEASED,

Petitioner,

–vs.–

DIAMOND SHAMROCK CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL INCORPORATED; HERCULES INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, also known as Thompson Chemical Corporation; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in finding—on the unique factual record developed in Agent Orange product liability litigation—that Respondent Agent Orange manufacturers acted pursuant to federal officers' directions and that a causal nexus existed between Respondents' action under color of federal office and Petitioner's claims of injury due to Agent Orange for purposes of federal jurisdiction under 28 U.S.C. § 1442(a)(1) based on findings of jurisdictional facts that, *inter alia:* (1) Respondents were "compelled to deliver Agent Orange to the government under threat of criminal sanctions"; (2) federal officers mandated "detailed specifications" for Agent Orange and Respondents complied with those specifications; and (3) the alleged harmful design feature of Agent Orange was "expressly considered and mandated" by the government.

2. Whether the court of appeals correctly ruled that the district court did not abuse its "broad discretion" under *Parklane Hosiery* by denying offensive collateral estoppel effect to a prior district court ruling that was, among other limitations, tentative and unreviewable on appeal.

3. Whether a corporation is a "person" entitled to remove under § 1442 in circumstances where a private individual would be so entitled.

INTERESTED PARTIES

John Winters, Sr., Individually and as Representative of the Estate of Margaret Winters	Petitioner
Fr. Martin Winters	Petitioner
Charles Winters	Petitioner
Diamond Shamrock Chemicals Company	Respondent
The Dow Chemical Company	Respondent
Monsanto Company	Respondent
Uniroyal, Inc.	Respondent
Hercules, Incorporated	Respondent
Thompson-Hayward Chemical Company	Respondent
T.H. Agriculture & Nutrition Company, Inc.	Respondent

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.1 of the Supreme Court Rules, respondents hereby state:

1. Diamond Shamrock Chemicals Company

In 1986, Occidental Chemical Corporation, an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, became the successor by merger of Diamond Shamrock Chemicals Company. Occidental Petroleum Corporation has the following non-wholly owned subsidiary: Canadian Occidental Petroleum Ltd.

2. The Dow Chemical Company

The Dow Chemical Company is a publicly traded company. It has no parent company. Upon information and belief, The Dow Chemical Company owns five percent or more of the shares issued to the public by Astropower, Inc.

3. Hercules Incorporated

Hercules Incorporated is a publicly held corporation whose shares are traded on the New York Stock Exchange. It has no parent company. Upon information and belief, Hercules Incorporated has the following subsidiaries:

Abieta Chemie GmbH
Algas Marinas S.A.
Alliance Technical Products
Aqualon Company
Aqualon France BV
Citrus Colloids Braspectina S.A.
Copenhagen Pectin A/S
Copenhagen Pectin S.A.

Curtis Bay Insurance Co., Ltd.
East Bay Realty Services, Inc.
FiberVisions A.G.
Fiber Visions A/S
FiberVisions Argentina S.A.
FiberVisions (China) A/S
FiberVisions (China) Textile Products, Ltd.
FiberVisions GmbH
FiberVisions Incorporated
FiberVisions L.L.C.
FiberVisions de Mexico, S.A. de C.V.
FiberVisions Products, Inc.
FiberVisions Products de Mexico, S.A. de C.V.
Franchem AG
Genu Philippines, Inc.
Genu Products Canada Ltd.
Hechem BC
Hercofina
Hercules AB
Hercules BV
Hercules Belgium N.V.
Hercules Canada Inc.
Hercules Chemical Corporation
Hercules China Limited
Hercules Country Club, Inc.
Hercules Credit, Inc.
Hercules CZ S.R.O.
Hercules de Mexico, S.A. de C.V.
Hercules do Brasil Produtos Quimicos Ltda.
Hercules Deutschland GmbH
Hercules Eastern Europe BV
Hercules Europe N.V.
Hercules Finance Company
Hercules Flavor, Inc.
Hercules GmbH
Hercules International Limited

Hercules International Trade Corporation Limited
Hercules (UK) Investments Finance Ltd.
Hercules Investments PLC
Hercules Investments Global Ltd.
Hercules (UK) Investments Limited
Hercules Investments L.L.C.
Hercules Investments P.L.C.
Hercules Islands Corporation
Hercules Italia S.p.A.
Hercules Japan Ltd.
Hercules Korea Chemical Co. Ltd.
Hercules Limited
Hercules Nederland BV
Hercules Overseas Corporation
Hercules Polska Sp.Z.O.O.
Hercules Quimica, S.A.
Hercules S.A.
Hercules-Sanyo, Inc.
Hercules Singapore Pte Ltd.
Hercules Trading Corporation
Hercules Ultramarine, Inc.
HISPAN Corporation HUK Trustee Company Limited
Inversiones Alfa S.A.
Little H Pty Limited
Organa Trust Reg., in Schaan
Oy Hercofinn AB
Pakistan Gum Industries Limited
Patex-Chemie GmbH
Pesquera Punta Rieles Ltda.
Pomosin GmbH
PRAF Limited
P.T. Hercules Mas Indonesia
Quimica Hercules de Colombia S.A.
Quimica Hercules, S.A. de C.V.
Quimproc, S.A. de C.V.
Rika-Hercules Inc.

St. Croix Petrochemical Corp.
Servi Q, S.A. de C.V.
Shanghai Hercules Chemicals Company, Ltd.
Taiwan Hercules Chemicals, Incorporated
Taloquimia, S.A. de C.V.
WSP, Inc.
ZANEA Seaweed Company Limited

Hercules Incorporated merged with BetzDearborn in October, 1998. Upon information and belief, BetzDearborn has the following subsidiaries:

BetzDearborn Argentina
BetzDearborn Australia Pry Limited
BetzDearborn Ges.mbH
BetzDearborn N.V.
BetzDearborn Brasil LTDA.
BetzDearborn Canada, Inc.
BetzDearborn de Chile Ltda.
BetzDearborn Colombia S.A.
BetzDearborn Denmark A/S
BetzDearborn de Ecuador S.A.
BetzDearborn OY
BetzDearborn S.A.
BetzDearborn GmbH
BetzDearborn China, Ltd.
BetzDearborn India Private Limited
PT BetzDearborn Persada
BetzDearborn Ireland Limited
BetzDearborn S.p.A.. Nippon BetzDearborn K.K
BetzDearborn Korea Ltd.
Betz (Malaysia) Sdn. BHD
BetzDearborn de Mexico S.A. de C.V.
BetzDearborn B.V.
BetzDearborn Norge A/S
BetzDearborn del Peru S.A.

BetzDearborn Portuguesa, Lda.
BetzDearborn Pta. Ltd.
BetzDearborn South Africa (Pry) Ltd.
BetzDearborn Iberica S.A.
BetzDearborn AB
BetzDearborn Taiwan Limited
BetzDearborn (Thailand) Co. Ltd.
BetzDearborn Limited
BetzDearborn de Uruguay S.A.
BetzDearborn Venezuela C.A.

4. Monsanto Company

Monsanto company is a publicly traded company. It has no parent. Upon information and belief, Monsanto Company is affiliated with DeKalb Genetics Corporation.

5. T.H. Agriculture & Nutrition Co., Inc.

T.H. Agriculture & Nutrition Co., Inc. (now known as T.H. Agriculture & Nutrition L.L.C.), formerly known as Thompson-Hayward Chemical Company and also sued herein as Thompson Chemical Corporation, is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V., a publicly held corporation based in the Netherlands.

6. Uniroyal, Inc.

Uniroyal, Inc., whose common and preferred shares were formerly publicly held, having disposed of substantially all of its assets and businesses transferred its net assets to the sole shareholder of its common stock, CDU Holding, Inc., a privately owned company.

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On Petition For a Writ of Certiorari
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For the Fifth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. The "Agent Orange Saga"

As the court below noted, this action is "part of the Agent Orange saga" and must be considered in terms of the history of that litigation. Pet. App. 39. Agent Orange was a herbicide used by the United States military in Vietnam to protect

American soldiers by defoliating jungle vegetation which provided cover for opposing forces. Respondents had manufactured Agent Orange for the military according to military specifications. Beginning in 1979, hundreds of suits alleging injury due to exposure to Agent Orange were filed in the Eastern District of New York and elsewhere against Respondents and others. All these cases were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation before Judge Jack B. Weinstein in the Eastern District of New York as MDL No. 381.

One of those cases, a national class action of veterans and family members, was settled in 1984. Judge Weinstein approved the fairness of the class action settlement and ruled that Respondents were entitled to summary judgment on various grounds in the other pending suits by civilians and by veteran plaintiffs who opted out of the class action. These rulings were affirmed by the Second Circuit in a series of opinions in 1987. *In re "Agent Orange" Product Liability Lit.*, 818 F.2d 145, 148 (2d Cir. 1987) (overview and summary of rulings), *cert. denied,* 487 U.S. 1234 (1988). Numerous petitions for certiorari were filed, and all were denied by this Court.

Other Agent Orange actions filed thereafter have continued to be transferred to MDL-381. *See, e.g., In re "Agent Orange" Product Liability Lit.*, 996 F.2d 1425 (2d Cir.), *cert. denied*, 510 U.S. 1140 (1994) (overview of Agent Orange litigation history) (finding federal jurisdiction over claims of veteran plaintiffs and dismissing those claims as barred by the 1984 class action settlement).

B. The Winters Agent Orange Action

1. *Filing in Texas, Removal to Federal Court, and Transfer to MDL-381.*

Margaret Winters filed the present action in Texas state court on February 5, 1993, alleging injury due to exposure to Agent Orange. Winters worked as a civilian nurse for the United States Agency for International Development in Vietnam from August 1966 to October 1967. Pet. App. 24. Because she was a civilian, she was not bound by the 1984 veteran class action settlement agreement and thus not barred by that agreement from filing this action. Respondents removed this action to the Eastern District of Texas pursuant to 28 U.S.C. § 1442(a)(1), where it was assigned to Judge Howell Cobb. Petitioner filed a motion to remand, which remained pending when the Judicial Panel on Multidistrict Litigation transferred the action to Judge Weinstein in the Eastern District of New York.

2. *Judge Weinstein Declines to Rule on Petitioner's Motion to Remand and Transfers the Case Back to Judge Cobb in Texas.*

Before Judge Weinstein, Petitioner sought remand based on an earlier ruling by Judge Weinstein in another Agent Orange case. *See Ryan v. Dow Chemical Co., et al.*, 781 F. Supp. 934 (E.D.N.Y. 1992), *leave to appeal denied*, No. 92-8008 (2d Cir. May 8, 1992), *appeal dismissed*, No. 92-7487 (2d Cir. June 16, 1992), *cert. denied*, 113 S.Ct. 599 (1992) ("*Ryan*"). In that opinion, Judge Weinstein, while finding lack of removal jurisdiction under § 1442, stated that the issue presented a "close question" and *sua sponte* certified the issue for interlocutory appeal. 781 F.Supp. at 950. However, *Ryan* was not reviewed on the merits, as the

appeals were denied for lack of appellate jurisdiction to review a remand order. *See* 28 U.S.C. § 1447(d).

As it happened, Judge Cobb had recently upheld removal under § 1442 in another case involving toxic tort claims against a military contractor. *See Akin v. Big Three Industries, Inc.*, 851 F. Supp. 819 (E.D. Tex. 1994), *aff'd*, 156 F.3d 1030 (10th Cir. 1998). Respondents argued before Judge Weinstein that *Akin* reflected the clear weight of recent authority and, moreover, that it would be unfair for MDL transfer from Judge Cobb to Judge Weinstein to change the result on federal jurisdiction, particularly given the tentative nature of the *Ryan* decision. Judge Weinstein decided not to deny remand based on his earlier ruling in *Ryan*. Instead, on April 13, 1995, he *sua sponte* ordered the case transferred back to Judge Cobb, "professing a lack of expertise with Texas substantive law." Pet. App. 41.

3. *Judge Cobb Finds Federal Removal Jurisdiction Under § 1442.*

On August 2, 1995, Judge Cobb denied remand, finding that defendants had properly removed the case under 28 U.S.C. § 1442(a)(1), which provides for removal of actions against "any [federal] officer (or any person acting under that officer) . . . for any act under color of such office." The statute protects federal officers and those acting under them "from being brought to trial in State courts for acts performed under the authority of the Federal Government." Pet. App. 5-6. The court found that Respondents, as corporations, were "person[s]" entitled to remove under § 1442 because corporations, like private individuals, engage in activities under federal direction which the statute is intended to protect. Pet. App. 4.

The court found that this Court's rulings on § 1442 required Respondents to demonstrate a "causal connection"—*i.e.*, "that plaintiff's state court action is derived from activities performed pursuant to federal direction"—and assert a "colorable federal defense." Pet. App. 6-7. The court found the requisite causal connection based on a finding that Respondents "were compelled under threat of criminal sanctions to deliver Agent Orange to the Defense Department." Pet. App. 7. Respondents' contracts were "DO-rated" under the Defense Production Act of 1950. U.S.C.A. App. §2061 *et seq.*, which "required companies to accept and fill governmental orders regardless of existing contracts or orders." Pet. App. 8. The court found that, due to a shortage of Agent Orange, the government required Respondents to divert their entire production capacity to Agent Orange instead of civilian herbicides. *Id. See* R 554-62.

The court found further causal connection because the government "expressly contracted for a specific mix of chemicals." Pet. App. 12. The government required that Agent Orange consist of a 50/50 mix of the n-butyl esters of 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T") conforming to detailed and specific military specifications. *Id.* The court rejected Petitioner's argument that the government did not specifically consider and require the alleged harmful design feature—the presence of extremely small quantities of dioxin in some Agent Orange. The court found "that the government expressly considered the design feature in question, exercised direction and control over the substances used in the production of Agent Orange, and that defendants provided the substances in conformity with those specifications."[1] Pet. App. 12. *See* R 516-20.

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[1] The court's findings were supported by extensive record evidence of the knowledge of federal officers involved with the development and requisitioning of Agent Orange with respect to military herbicides, the

Turning to the second element of jurisdiction under § 1442, the district court found that defendants had asserted two colorable federal defenses: the government contract defense and immunity under the Defense Production Act. Pet. App. 17-18. The court noted that this Court found that federal procurement interests required recognition of the government contract defense in *Boyle v. United Technologies Corp.*, 487, U.S. 500 (1988), and that Respondents had been granted summary judgment on the government contract defense in earlier Agent Orange litigation. The court found these defenses demonstrated a federal interest in the matter and were sufficient for jurisdiction under § 1442.

Finally, the court rejected Petitioner's request for offensive collateral estoppel based on the district court ruling in *Ryan*. Pet. App. 20. The district court noted its "broad discretion" under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), to determine whether estoppel would be unfair in a particular case. Pet. App. 19. The court determined that estoppel was unwarranted for several reasons, including the failure of the Second Circuit to decide jurisdiction under § 1442 in *Ryan*, and the limited precedential value of *Ryan*. Pet. App. 20.

Agent Orange manufacturing process, and dioxin's possible presence in Agent Orange and its possible health effects. For example, faced with a shortage of Agent Orange, federal officers undertook in 1967-68 to build a government Agent Orange manufacturing plant at Weldon Spring, Missouri. The documentation of that government plant demonstrates that federal officers understood factors which affected the creation of dioxin in the Agent Orange manufacturing process and included a section titled "DIOXIN" in the draft manual for operations of the plant. *See* R 554-62; *In re Agent Orange*, 597 F. Supp. 740, 798 (E.D.N.Y. 1984); *In re Agent Orange*, 818 F.2d at 1748 ("the government had as much knowledge as defendants of the dangers of dioxin"); *In re Agent Orange*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (affirming summary judgment for Respondents on the government contract defense); R 516-70.

4. *Judge Cobb Dismisses on Statute of Limitations And Denies Reargument.*

On September 25, 1996, the district court, applying Texas state law, ruled that Petitioner's suit was barred by the statute of limitations. Pet. App. 23. While Petitioner did not file suit until 1993, her cause of action accrued by the mid 1980's at the latest, when her illness had been diagnosed and there had been extensive media coverage regarding alleged links between Agent Orange and her illness. Pet. App. 30-33. On October 7, 1996, plaintiff moved for a "new trial and rehearing" and for reargument on the denial of remand. Pet. App. 81. On December 13, 1996, after due deliberation on the full record at that time, the district court denied the motion and dismissed the case.

5. *The Fifth Circuit Affirms § 1442 Jurisdiction And Dismissal.*

On appeal, the Fifth Circuit affirmed federal jurisdiction under § 1442, noting that the statute should be given "a broad reading so as not to frustrate the statue's underlying rationale." 149 F.3d at 398, *citing Arizona v. Manypenny*, 451 U.S. 232, 242 (1981); *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Pet. App. 62-63. The court found that Respondents were "persons" entitled to remove under § 1442 and that they had asserted colorable federal defenses showing a federal interest in the matter: the government contract defense and immunity under the Defense Production Act. Pet. App. 61, 71.

The court of appeals, like the district court, found the requisite causal connection in the government's "compulsion" of Respondents and its precise specifications for Agent Orange:

> We are convinced that the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to demonstrate that the defendants acted pursuant to federal direction and that a direct causal nexus exists between the defendants' actions taken under color of federal office and Winter's claims.

Pet. App. 66-67. The court of appeals rejected Petitioner's claim that Agent Orange was an "off-the-shelf" product. While raw materials used to manufacture Agent Orange were also used by Respondents at other times to manufacture civilian herbicides, Agent Orange was never used as a civilian herbicide and differed in important respects from civilian herbicides. Pet. App. 64-66. The court of appeals further noted that the government prohibited Respondents from placing any warnings on Agent Orange. Pet. App. 65. This prohibition provided an additional causal nexus with Petitioner's failure to warn claims.

Regarding offensive collateral estoppel, the court of appeals explained at some length that "it would seem appropriate to hold as a matter of law that collateral estoppel may not be applied offensively to a jurisdictional decision—such as one granting a motion to remand—that is not capable of being subjected to appellate review." Pet. App. 55. But the Fifth Circuit did *not* so hold, concluding that "the restraining hand of precedent . . . arguably limits our

ruling"[2] and that this case could easily be decided under the abuse of discretion standard without reaching the issue. Pet. App. 56. Thus, the court of appeals "decide[d] simply whether the district court abused its discretion when it declined to estop defendants" from claiming jurisdiction under § 1442. Pet. App. 57.

The court summarily noted a variety of circumstances in this case which supported the district court's discretion in denying estoppel. First and foremost was the unavailability of appellate review, which the court plainly viewed as sufficient to support the district court's exercise of discretion in and of itself. Pet. App. 55. In addition, the *Ryan* court had found jurisdiction under § 1442 to present a "close question" and had suggested certification of the issue for interlocutory appeal *sua sponte*. Pet. App. 57. Finally, the court noted that it was not fair to bind a defendant to a decision that had been affirmed on unrelated alternative grounds. Pet. App. 57. As the district court below noted, there were two *Ryan* appeals to the Second Circuit involving jurisdiction under § 1442, one denying appellate jurisdiction to review the order remanding two civilian plaintiffs and a second affirming federal jurisdiction over the veteran plaintiffs in *Ryan* on other grounds and declining to reach the issue of § 1442 jurisdiction. *See In re "Agent Orange,"* 996 F.2d at 1430-32. Thus, the court below concluded that "[c]onsiderations of fairness then, as set out in *Parklane*, dictate that collateral estoppel should not be applied to the *Ryan* Court's decision." Pet. App. 57-58.

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2 The Fifth Circuit noted that some cases involving mutual estoppel or res judicata arguably rejected an absolute rule against preclusion where appellate review was unavailable, but distinguished those cases because the rules of offensive collateral estoppel are "more restrictive" than where an estoppel is mutual to achieve finality. Pet. App. 56 & n.11.

Having found federal jurisdiction, the Fifth Circuit then affirmed the dismissal of Petitioner's suit based on Texas state law of limitations. Pet. App. 71.

6. *Judge Weinstein Indicates He Will Follow The Fifth Circuit's Ruling*

Judge Weinstein entered the opinion of the court of appeals in this case on the docket in MDL-381 shortly after it issued. RA1. Then, during a January 29, 1999 hearing in another civilian Agent Orange case, Judge Weinstein indicated that he would follow the Fifth Circuit's decision in this case rather than his prior decision in *Ryan*. When counsel for Respondents requested supplemental briefing on a motion to remand filed prior to the Fifth Circuit's denial of remand in *Winters*, Judge Weinstein stated as follows:

THE COURT:	Hasn't there been a case subsequent to my remand analysis, indicating that remand was not required in these cases?
MR. SABETTA:	That's correct, Your Honor.
THE COURT:	Follow that decision.
MR. SCHWARTZ:	[argues for remand]
THE COURT:	I'm not going to remand it to the state court.

RA 3-4.[3]

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[3] The docket entry for the hearing states that that the motion to remand was denied and that the case was ordered transferred to the Southern District of Texas. RA 5-6. However, in a subsequent handwritten order accompanying the signed transfer order, Judge Weinstein, indicating that he did not intend to foreclose action by the transferee court as it might deem appropriate, stated that the motion to remand had not been decided and that further discovery could take place in Texas. RA7.

REASONS FOR DENYING THE PETITION

I.

Petitioner Challenges Only The Result Below—Not The Legal Principles Applicable To Jurisdiction Under § 1442—A Matter Of No General Importance In Light Of The Unique Jurisdictional Facts Presented In Agent Orange Litigation.

A. Petitioner Admits That The Courts Below Applied The Correct Legal Standard And Proposes Only A Factbound Question Unsuitable For Review

The first question proposed by Petitioner for review is whether defendants *in fact* satisfy the requirements for removal under 28 U.S.C. § 1442(a)(1), *i.e.*, whether there was "*sufficient* causal connection between what the defendants did under asserted official authority and what they were being sued for in the state court," and whether the federal control over defendants was sufficiently "*detailed*." Pet.1-2 (emphasis added). Petitioner raises no objection to the legal standard for jurisdiction under § 1442 applied by the court below and concedes that the court "did articulate the test essentially correctly." Pet. 17.

Petitioner's factbound question plainly does not warrant certiorari and would be ill-suited for resolution in this Court in any event. Considering whether the causal connection established in the record was "sufficient" and whether the federal control was sufficiently "detailed" would involve analysis of the unique, complex, and voluminous factual record of historical, technical and scientific documents and testimony developed in Agent Orange litigation. Any opinion by the Court would provide little guidance to the lower courts as to any matters other than Agent Orange cases because of the

atypical factual record on which it would be based. The granting of certiorari in such circumstances would be inefficient and unproductive given the extensive factual record, the alternative findings of the courts below each sufficient to support jurisdiction under § 1442, and the deferential review accorded such findings of jurisdictional facts. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) (deferential review).

B. There Remains No Substantial Conflict Of Any Sort Among Any Federal Courts As To Jurisdiction Under § 1442 In Agent Orange Cases.

Both the Fifth Circuit in this case and the Tenth Circuit in *Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998), have upheld § 1442 removal of toxic tort claims against government contractors claiming to have acted under federal direction. Petitioner seeks certiorari based on mere difference in result between the Fifth Circuit's ruling upholding jurisdiction under § 1442 in this case and an earlier district court ruling to the contrary in *Ryan*, another Agent Orange case. Petitioner claims no conflict between decisions of the courts of appeals. Conflicts between rulings of a district court and a court of appeals are generally inappropriate for certiorari, as they are often resolved without developing into a conflict between courts of appeals. That is what has happened here. While the district court in *Ryan* initially ruled against jurisdiction under § 1442, it found the issue a "close question" at that time and has recently stated that it will follow the ruling of the Fifth Circuit in this case. Thus, there remains no substantial conflict among the decisions of any courts of appeals or district courts—either as to the governing legal principles or the proper result on the facts of this case.

Petitioner discusses several trial court rulings concerning § 1442 jurisdiction over suits against government contractors

in various different factual circumstances, suggesting that these trial court rulings are in conflict and that some are extending § 1442 to the "furthest extreme." Pet. 15. The handful of trial court rulings cited involving § 1442 removal by government contractors during the last decade hardly supports Petitioner's hyperbole. In actuality, the rulings have been fairly equally divided between those finding and those denying jurisdiction under § 1442, as is to be expected considering the quite diverse factual records in those cases. There have been few appellate rulings in such cases to date, and there is relatively little disagreement as to the applicable legal rules governing § 1442 jurisdiction even at the trial court level. The situation as a whole indicates that the trial courts are handling these cases without difficulty using settled general principles of § 1442 jurisdiction, with little need of review or supervision by the courts of appeals, much less this Court.

C. The Fifth Circuit Ruling Fully And Properly Resolves The Narrow Question Of § 1442 Jurisdiction On The Unique Factual Record Regarding Agent Orange, Rendering Any Ruling By This Court Unnecessary And Of No General Importance.

Petitioner concedes that the Fifth Circuit correctly stated the controlling legal standard: jurisdiction under § 1442 requires: "a finding that the defendants acted pursuant to a federal officer's directions and that a causal nexus exists between the defendants' actions under color of federal office and the plaintiff's claims," *citing Willingham v. Morgan*, 395 U.S. 402, 409 (1969), *citing Maryland v. Soper (No. 1)*, 270 U.S. 9, 33 (1926). Pet. App. 62, Pet. 17-18. Unable to challenge the legal rules applied by the court below or point to any conflict in the courts of appeals, Petitioner argues at length simply that the Fifth Circuit is "wrong" and the district court ruling in *Ryan* was "eminently correct." Pet. 20. Petitioner's

arguments misstate or ignore much of the extensive record and factual findings by the courts below establishing Respondents' actions at the direction of federal officers and the requisite causal connection between those actions and Petitioner's claims.

The following brief discussion of some of those misstatements and omissions makes clear both the soundness of the ruling below and the uncertworthiness of the petition. Petitioner's arguments are heavily factbound, and involve a unique and complex factual record. The jurisdictional facts found below squarely support § 1442 jurisdiction and would be reviewed deferentially, only for clear error.

a. Federal Compulsion of Respondents

First and foremost, Petitioner seeks to ignore and avoid a critical fact found by the courts below: Respondents were "compelled to deliver Agent Orange to the government under threat of criminal sanctions." Pet. App. 7-8, 63. Using their emergency war powers under the Defense Production Act, federal officers effectively seized the entire domestic manufacturing capacity for 2,4,5-T, the limiting raw material in the manufacturing of Agent Orange. Had Respondents refused to supply the chemicals specified by the military, federal officers could have prosecuted company officials and seized the manufacturing facilities. This was the first and, as far as we are aware, the only occasion in which the entire domestic production capacity of a chemical has been taken for military use. The evidence establishing these facts is extensive and undisputed. Judge Weinstein in *Ryan* also recognized that Respondents were "compelled under threat of criminal sanction to deliver Agent Orange produced according to government specifications to the Defense Department." 781 F. Supp. at 950.

The singular fact of compulsion sets this case apart from other cases in which government contractors have sought removal under § 1442, making it a clear-cut example of a case removable under § 1442 rather than an extreme extension as Petitioner suggests. The Defense Production Act has been repealed, and the military has long discontinued the use Agent Orange. It is unlikely that any significant number of cases involving government contractors acting under such extreme federal compulsion will come before the courts in the future. The presence of such atypical and highly significant facts counsels strongly against a grant of certiorari in this case. Any ruling by the Court against such a factual background would necessarily be narrow and of little guidance in future cases. For the same reason, the Fifth Circuit's ruling in this respect will have little precedential impact outside of other Agent Orange litigation, and so does not warrant further review.

b. Agent Orange Was Not An "Off the Shelf" Commercial Product.

Petitioner's other arguments fare no better, as they also turn on the unique details of the Agent Orange factual record and would be of minimal importance outside of Agent Orange litigation. For example, Petitioner's "off the shelf" argument runs as follows: (1) the government was merely a naive customer that asked Respondents for an "off-the-shelf" generic weedkiller, (2) Respondents decided to send the government a commercial herbicide contaminated with dioxin and concealed that fact from the government, (3) thus there was no causal connection between Respondents' actions under federal direction and Petitioner's claims of injury due to dioxin in Agent Orange. Pet. 17-18.[4]

[4] Petitioner's argument is a transparent attempt to interject issues going to the merits into the threshold determination of jurisdiction. But the purpose of § 1442 is to allow defenses of federal authority to be heard in federal court, and, as the court below noted, Respondents "need not win

The Fifth Circuit quoted and discussed some of the extensive record facts demonstrating that Agent Orange was not an off-the-shelf commercial product. Pet. App. 64-66. The court found that federal officers—not respondents—specified the precise chemical composition of Agent Orange, and that Respondents were acting under detailed federal direction by manufacturing Agent Orange conforming to the military's specifications. Pet. App. 65-67. The district court had also rejected Petitioner's "off the shelf" argument as "inconsequential" for those reasons. Pet. App. 12.

The Fifth Circuit understood that "the gist of this action centers around the trace elements of dioxin contained in Agent Orange." Pet. App. 66. The court found a "direct causal nexus" between Petitioner's claim of injury due to dioxin in Agent Orange and the "government's detailed specifications" of the makeup of Agent Orange. The government—fully knowledgeable regarding the possible presence and health effects of dioxin in 2,4,5-T—mandated the use of 2,4,5-T in Agent Orange—not any of dozens of other herbicides which Respondents might have elected to supply. Pet. App. 65-67; R 516-70. The district court similarly found a causal connection between the government-mandated specifications that Agent Orange be made using 2,4,5-T and Petitioner's claims because "the government expressly considered the design feature in question." Pet. App. 12.

Petitioner severely misstates the Fifth Circuit's conclusion, asserting that it is based on an "astounding" and unsupported belief that some "synergistic" effect resulted from combining 2,4-D and 2,4,5-T in Agent Orange. Pet. 18-19. In fact, the Court was plainly stating a causal connection between Petitioner's claims and Respondents' actions under federal

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[their] case before [they] can have it removed." Pet. App. 68, *quoting Willingham*, 395 U.S. at 407.

direction: "the alleged deadly properties of Agent Orange result from the particular mixture of the component chemicals that the government dictated." Pet. App. 71.

D. Considerations of Federalism Do Not Support Certiorari.

The Petition concludes with two flatly contradictory invocations of principles of federalism. First, Petitioner argues that federalism requires that this suit be remanded to state court because it involves only state law claims and federal interests are minimal. Pet. 26. Then, on the next page, Petitioner avers that "important questions of federal procurement policy suggest the need for intervention by this Court." Pet. 27.

While § 1442 involves important federal interests, the rulings of the courts below properly protect those interests. The general lack of conflict in the rulings of the lower courts indicates that the competing federal and state interests affected by § 1442 are being accommodated in accordance with the principles of federalism. Accordingly, there is no need for review in this Court.

The courts below concluded that § 1442 removal by government contractors does involve important federal interests regarding procurement of military supplies. This Court in *Boyle v. United Technologies*, 487 U.S. 500, 512 (1988), found such federal procurement interests sufficiently important to override substantive state product liability law. It would seem self–evident in light of *Boyle* that those federal interests would also be sufficient to support removal to a federal forum, a far less drastic intrusion on a state's sovereignty than the overriding of its substantive tort law.

In sum, Petitioner raises no legal issue or conflict in decisions meriting review. Petitioner's request for certiorari is

essentially a challenge to the findings of jurisdictional facts made by the courts below. Those findings are solidly supported in the record and would be deferentially reviewed. Any opinion by this Court would be of little general importance because of the unusual factual circumstances, which are now long past.

II.

Review Of The Denial Of Offensive Collateral Estoppel Is Not Warranted Because Petitioner Only Challenges The Result Below, Not The Controlling *Parklane Hosiery* Legal Standard, And The Court Below Plainly Did Not Abuse Its "Broad Discretion" Under That Standard.

Petitioner asks this Court to review whether the doctrine of offensive, non-mutual collateral estoppel requires that the ruling of the Fifth Circuit affirming federal jurisdiction under § 1442 be reversed due to a prior district court ruling in a different Agent Orange case—even though that district court ruling was tentative and the district court has now indicated that it is persuaded by and will follow the ruling of the Fifth Circuit in other Agent Orange litigation before it in MDL-381.

As with § 1442, Petitioner does not dispute the applicable legal standard: the elements of offensive collateral estoppel as established in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Pet. 28. Under *Parklane Hosiery*, a district court possesses "broad discretion" in determining whether fairness permits the use of offensive collateral estoppel in the circumstances of a particular case, and appellate review of the exercise of that discretion is deferential. 439 U.S. at 331. Petitioner's proposed question for review regarding collateral estoppel, like the question involving § 1442, simply asks whether the ruling on the facts of this particular case is correct.

Petitioner does not pose any substantial legal issue at all, much less an issue of general importance involving conflicting appellate rulings which might be appropriate for review. A ruling by the Court in these circumstances would be of interest only to the parties. Review for possible abuse of the district court's "broad discretion" would be particularly wasteful of judicial resources in this case given the numerous alternative factors supporting the lower courts' discretionary denial of estoppel.

In an attempt to fashion a conflict, Petitioner attacks a purported ruling that the Fifth Circuit explicitly declined to make. Petitioner claims that the court below "essentially held that a remand order, or any order from which the usual right of appeal does not exist, can *never* have preclusive effect." Pet. 34. While the court of appeals did discuss whether Petitioner's argument for offensive collateral estoppel was so weak given the unavailability of an appeal from *Ryan* that it should be denied as a matter of law, the court expressly declined to decide the issue on that basis. Pet. App. 56. Petitioner's extended discussion regarding this issue is beside the point for purposes of certiorari.

The court below made clear that the issue it decided was "simply whether the district court abused its discretion when it declined to estop defendants" from claiming jurisdiction under § 1442. Pet. App. 57. Given the deferential review granted to a district court's exercise of its "broad discretion" as to whether offensive collateral estoppel is fair in a particular case, Petitioner has little to say in support of certiorari for the actual holding below.

Petitioner does complain that the Fifth Circuit "reached out to a purported ground for 'unfairness' not mentioned nor discussed in *Parklane*." Pet. 29. There is obviously no merit to Petitioner's complaint. *Parklane Hosiery* adopted the

following "general rule" to guide trial courts in the exercise of their "broad discretion":

> where, either for the reasons discussed above *or for other reasons*, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

439 U.S. at 331 (emphasis added). The reference to "other reasons" clearly indicates this Court's intention that trial courts should consider all relevant reasoning bearing on the question of fairness or unfairness of preclusion in a particular case.

The various grounds discussed by the courts below are each widely recognized by the courts and commentators as appropriate factors for trial courts to consider when determining whether to apply offensive collateral estoppel, as the citation and discussion in the opinions below makes clear. Petitioner has failed to identified any legal or policy issues in the Fifth Circuit's actual holding of any substantial significance, much less issues of general importance which might divide the lower courts and call for resolution by this Court.

Petitioner ignores the fact that Judge Weinstein found the jurisdiction issue to be a "close question" and certified it for appeal, but that appellate review was barred. Petitioner urges this Court to grant review and apply offensive collateral estoppel to overturn the Fifth Circuit's ruling, reinstate Judge Weinstein's tentative ruling in *Ryan*, and require all other courts to follow *Ryan* rather than the Fifth Circuit's ruling—even though Judge Weinstein himself did not apply *Ryan* when this case was transferred for a time to his court and has indicated that he will follow the Fifth Circuit's ruling. Such a result would turn the requirement of fairness

underlying offensive collateral estoppel on its head and do great violence to the principles of trial court discretion in the application of offensive collateral estoppel established in *Parklane Hosiery*.

III.

Certiorari Is Not Warranted Because The Lower Courts Are In General Agreement That § 1442 Provides For Removal By Corporations As Well As Individuals And That Removal By Corporations Furthers The Policies Underlying Section 1442.

Petitioner also requests—with minimal explanation—that the Court grant review to rule that a corporation is not a "person" for purposes of § 1442 and can never remove cases under that statute, even when compelled to act under the direction of federal officers pursuant to federal authority. Pet. 36-37. Petitioner is unable to cite any rulings in the courts of appeals supporting its position—only two older district court cases involving removals by the American Red Cross. Pet. 16 n. 6, 36-37. The courts below found that a corporation should be considered a "person" potentially entitled to remove under § 1442 because corporations may act under the direction of federal officers to implement federal policy in the same manner as individuals. Pet. App. 4; 61-62. Numerous courts of appeals and district courts have upheld removal by corporations under § 1442. *See, e.g., Akin v. Big Three Industries*, 851 F. Supp. 819 (E.D. Tex. 1994), *aff'd, Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998); *Camacho v. Authoridad de Telephonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989); *Peterson v. Blue Cross/Blue Shield*, 508 F.2d 55 (5th Cir.), *cert. denied*, 422 U.S. 1043 (1975); *Texas v. National Bank of Commerce of San Antonio*, 290 F.2d 229, 231 (5th Cir.), *cert. denied*, 368 U.S. 832 (1961); *Crocker v. Borden, Inc.*, 852 F. Supp. 1322 (E.D. La. 1994);

Pack v. AC and S, Inc., 838 F. Supp. 1099 (D. Md. 1993), *rec. denied*, 857 F. Supp. 26 (D. Md. 1994); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *See* Wright, Miller & Cooper, Federal Practice and Procedure § 3727 ("Courts generally allow a corporation to be considered a "person" for Section 1442 purposes."). In view of this general consensus, there is no conflict among the courts of appeals or other courts meriting review.

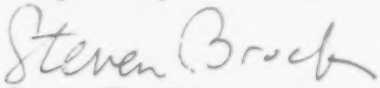
Aware of the absence of conflict, Petitioner suggests that the rulings of the courts below and the other courts cited above are somehow inconsistent with "a reasonable extension" of *International Primate Protection League v. Administrators of the Tulane Educational Fund,* 500 U.S. 72 (1991). Pet. 37. Petitioner stubbornly ignores the fact that Congress subsequently amended § 1442 to legislatively reverse the decision in *Primate Protection*, even though this was pointed out by the court of appeals in its opinion below. Pet. App. 59. Petitioner's request for an "extension" of a ruling that has been legislatively reversed obviously does not merit review. Moreover, *Primate Protection* focussed on whether the term federal "officer" in § 1442 could be read to include a federal "agency," a linguistically difficult reading for which there was little support in other uses of "officer" in federal statutes. This case involves the interpretation of "person" to include corporations, which is commonplace in federal law where the federal policies underlying the law apply to corporations as well as individuals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Uniondale, New York
February 16, 1999

Respectfully submitted,



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APPENDIX A

Docket Entry in *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, Dated October 6, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION — MDL No. 381

DOCKET ENTRY

Sub#	Date	Description
16547	10/6/98	Opinion Margaret Winters C of A. Fifth Circuit (ri)

APPENDIX B

Excerpt from Transcript of Proceedings in *Miller, et al. v. Diamond Shamrock Co., et al.*, No. CV 95-4865 (E.D.N.Y. Jan. 29, 1999)

UNITED STATES DISCTRICT COURT
EASTERN DISTRICT OF NEW YORK

RODNEY MILLER, et al., CV 95-4865
Plaintiffs,

v.

DIAMOND SHAMROCK CO., et al.,
Defendants.

United States Courthouse
Brooklyn, New York
January 29, 1999
9:30 o'clock a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For Plaintiffs: NEWTON SCHWARTZ, ESQ.

For Defendant
Diamond Shamrock: MICHAEL M. GORDON, ESQ.

For Defendant
Monsanto Co.: Seyfarth Shaw Fairweather
& Geraldson

1610 Avenue of the Americas
New York, New York 10620
BY: JOHN SABETTA, ESQ.

For Defendant
T. H. Agriculture
& Nutrition: LAWRENCE T. D'ALOISE, JR., ESQ.

For Defendant Hercules: WILLIAM KROHLEY, ESQ.

Court Reporter: Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 254-7226

Proceedings recorded by mechanical stenography, transcript produced by CAT.

MR. SABETTA: There is pending in this case a motion to remand, which was filed when the case was in federal district court in Texas, came up to your Honor. We submitted opposition papers when the case first became part of your Honor's docket, and that motion has not been resolved. It will need to be resolved at some point.

We would like, in connection with that motion, to submit supplemental papers, because there's been a fair amount that's happened since the motion was first filed.

THE COURT: Hasn't there been a case subsequent to my remand analysis, indicating that remand was not required in these cases?

MR. SABETTA: That's correct, your Honor.

THE COURT: Follow that decision.

MR. SCHWARTZ: I'm remaining silent and not interrupting.

On that point, the identical state court case that was removed was remanded, by Judge Janice Graham Jack, federal judge in Corpus Christi, to the state court. And all but thirteen of the ninety-four have settled. One or two of these defendants may have a related defendant who was or still is in the cases.

The issues are not identical. Besides the normal remand, they raised the question that it was a complex – that this, being a federal complex, was a basis for independent federal court jurisdiction. She denied those, and, of course, that was not appealable. It isn't appealable in the Fifth Circuit.

THE COURT: I'm not going to remand it to the state court. I'm going to transfer it back to Texas.

MR. SCHWARTZ: Very well, your Honor.

APPENDIX C

Docket Entry in *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381; *Miller, et al. v. Diamond Shamrock Co., et al.*, No. CV 95-4865 (E.D.N.Y.), Dated January 29, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION — MDL No. 381

RODNEY A. MILLER, ET AL.,
Plaintiffs,

-against- — 95-CV-4865

DIAMOND SHAMROCK
CHEMICALS COMPANY, ET AL.,
Defendants.

DOCKET ENTRY

1/29/99	23	Calendar entry: before Judge Weinstein–Civil Cause for Motion hearing. Case called. Counsel for all sides present. Motion argued. Motion Denied. Case is ordered transferred back to the District Court, Southern District of Texas. (sg) (Entry date 01/03/99)

APPENDIX D

Handwritten Ruling on Motion For Remand, *Miller, et al. v. Diamond Shamrock Co., et al.*, No. CV 95-4865 (E.D.N.Y.), Dated January 29, 1999

Date 1/29/99

BEFORE JUDGE WEINSTEIN AT 9:30 A.M/~~P.M.~~

C/R ~~or ECR~~ T. MANCUSO MAG.

CIVIL CAUSE FOR MOTION HEARING

Docket Number CV95-4865

Title: Rodney Miller et al vs. Diamond Shamrock Co.

motion for remand

Appearances: For Pltff. Newton Schwartz

For Deft. Michael Gordon et al

√ Case called.

√ Counsel for all sides present.

√ Motion argued.

√ Motion Denied.

√ Other: Case is ordered transferred back to the District Court, Southern District of Texas.

APPENDIX E

Handwritten Order in *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381; *Miller, et al. v. Diamond Shamrock Co., et al.*, No. CV 95-4865 (E.D.N.Y.), Dated February 2, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION — MDL No. 381

RODNEY A. MILLER, ET AL.,
Plaintiffs,

-against- — 95-CV-4865

DIAMOND SHAMROCK
CHEMICALS COMPANY, ET AL.,
Defendants.

ORDER*

Notify parties: The Court makes no decision [regarding?] motion to remand. Further discovery can more appropriately take place in Texas.

So Ordered.

s/

Jack B. Weinstein

2/2/99

*Handwritten Order endorsed on a letter from John C. Sabetta to Hon. Jack B. Weinstein, dated February 2, 1999.